EDITOR'S NOTE

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ORIGINAL

NO. 85-5024 (A)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL KENT POLAND,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where an appellate court, after reversing petitioner's convictions, found that the evidence did not support the one aggravating circumstance found by the trial court, does the double jeopardy clause prohibit reimposition of the death penalty following petitioner's conviction upon a retrial?

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STATEMENT OF THE CASE

On April 26, 1979, the grand jury of Yavapai County returned an indictment charging petitioner and his brother, Patrick Gene Poland, with two counts of first-degree murder in violation of former Ariz.Rev.Stat.Ann. §§ 13-451 and -452. The indictment alleged that petitioner and his brother had killed two Purolator Security Guards, Russell Dempsey and Cecil Newkirk, on or about May 25, 1977.

The matter proceeded to trial before a jury in late October of 1979. On November 24, 1979, the jury found both men guilty of both of the murder charges. Then, pursuant to former Ariz.Rev.Stat.Ann. §§ 13-453 and -454, the trial court held an aggravation-mitigation hearing before imposing sentence. On April 29, 1980, the trial court sentenced petitioner and his brother to death for the murders of Dempsey and Newkirk. In its special sentencing verdict the trial court made the following findings with respect to aggravating circumstances:

> 3. The court finds the aggravating circumstances in § 13-454 E(3) [sic][1] is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.
>
> This, then, would be an aggravating circumstance.
>
> 4. The court finds the aggravating circumstance in § 13-454 E(4) [sic][2] is present.
>
> The cause of death was by drowning. The victims were kidnapped on I-17 in

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1. The correct statutory provision was former Ariz.Rev.Stat.Ann. § 13-454(E)(5).

2. The correct statutory provision was former Ariz.Rev.Stat.Ann. § 13-454(E)(6).

> southern Yavapai County, they were transported to Lake Mead. At some time they were placed in canvas bags, taken onto the lake and placed in the water to drown. Such killings were especially hienous [sic], cruel, and depraved.
>
> In applying this provision, the Arizona Supreme Court has said that these words have meanings that are clear. The evidence shows that the killings were carefully planned and cold blooded. This, by itself, is not sufficient, however, as pointed out in St. v. Madsen ____Ariz.____, ____P2d____ (filed March 26, 1980) and had the murders taken place at the scene on I-17 they would not likely have been set aside from the norm of first degree murder.
>
> But the facts show the murders were shockingly evil, insensate, and marked by debasement.
>
> The Defendants argue that the State has not shown the victims suffered pain, or that they were not drugged.
>
> The guidelines of State v. Knapp 114 Az. 531, 562 P2d 704 closely reach this case. In Knapp the victims were incinerated. The autopsy shows there was carbon monoxide poisoning as well, a painless death. The nature of the killing itself is sufficient to set it aside from the norm. Placing victims in canvas bags and dropping them to a slow and terrifying death is grossly bad, sadistic and perverse.

The trial court found some mitigating circumstances (previous reputation for good character, close family ties), but concluded that they were not sufficiently substantial to call for leniency.

Petitioner and his brother appealed from the judgments of guilt and sentences imposed. On April 13, 1982, the Arizona Supreme Court reversed the convictions of petitioner and his brother and remanded the matter for a new trial. State v. Poland, 132 Ariz. 269, 645 P.2d 784 (1982). The reversal was based on the court's finding that the jury had been guilty of misconduct because it had considered evidence not admitted at trial. Id. at 281-85,

796-800. In their appellate brief petitioner and his brother had argued that there was insufficient evidence to support the trial court's finding of the aggravating circumstance set forth in former Ariz.Rev.Stat.Ann. § 13-454(E)(6). The Arizona Supreme Court responded to that claim as follows:

> In sentencing defendants, the trial judge found the following aggravating circumstance to exist:
>
> "13-454(E)(6). The defendant committed the offense in an especially heinous, cruel, or depraved manner."
>
> Finding no mitigating circumstances sufficiently substantial to call for leniency, the trial court imposed the death penalty pursuant to A.R.S. § 13-454(D).
>
> In interpreting the aggravating circumstance that the offense was committed in an especially heinous, cruel, or depraved manner, we have stated:
>
> > * * * the cruelty referred to in the statute involved the pain and the mental and physical distress visited upon the victims. Heinous and depraved as used in the same statute meant the mental state and attitude of the perpetrator as reflected in his words and actions." State v. Clark, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980), cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612.
>
> We do not believe that the evidence so far produced in this case shows that the murders were cruel. We have interpreted "cruel" as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic." State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979), quoting Webster's Third New International Dictionary. There was no evidence of suffering by the guards. The autopsy revealed no evidence that they had been bound or injured prior to being placed in the water, and there was no sign of a struggle. Cruelty has not been shown beyond a reasonable doubt. State v. Lujan, supra; State v. Ortiz, Ariz., 639 P.2d 1020 (1981); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978).

Neither does the evidence support a finding that the murders were heinous or depraved. These terms were defined in State v. Lujan, supra:

> "heinous: hatefully or shockingly evil: grossly bad
>
> * * * * * *
>
> "depraved: marked by debasement, corruption, perversion or deterioration." 124 Ariz. at 372, 604 P.2d at 636.

The issue focuses on the state of mind of the killer. State v. Lujan, supra. The difficulty in making this determination in the case at bar is that there is very little evidence in the record of the exact circumstances of the guards' deaths. Although defendants' state of mind may be inferred from their behavior at or near the time of the offense, State v. Lujan, supra, we know nothing of the circumstances under which the guards were held hostage.

The State must prove the existence of aggravating circumstances beyond a reasonable doubt. State v. Jordan, 126 Ariz. 283, 614 P.2d 825, cert. denied 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). We do not believe it has been shown beyond a reasonable doubt that the murders were committed in an "especially heinous, cruel or depraved manner."

We do note, however, that the trial court mistook the law when it did not find that the defendants "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-454(E)(5). In so holding, the trial judge stated:

> "5. The court finds the aggravating circumstance in § 13-454E(5) is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.
>
> "This, then, would be an aggravating circumstance."

It was not until after the trial in this case that we held, in State v. Clark, supra, that A.R.S. § 13-454(E)(5) was not limited to "murder for hire" situations,

> but may be found where any expectation of financial gain was a cause of the murder. Upon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance.
>
> Reversed and remanded for new trial pursuant to this opinion.

Id. at 285-86, 800-01.

A retrial of petitioner and his brother commenced in October of 1982. On November 18, 1982, the jury found both men guilty of both murder charges. Once again the trial court held the statutorily required aggravation-mitigation hearing. On February 3, 1983, the trial court sentenced petitioner and his brother to death for the murders. The trial court made the following findings on aggravating circumstances:

> 2. The court finds the aggravating circumstance in §13-454 E(2) is not present as to Michael Poland, but is present as to Patrick Poland in that on October 5, 1981, Patrick Poland was convicted of bank robbery and use of a dangerous weapon in a bank robbery in violation of Title 18, U.S.C. §2113(a) and (d), in U.S. District Court, affirmed by the 9th Circuit Court of Appeals on August 16, 1982. Certiorari denied by the U.S. Supreme Court on November 23, 1982.
>
> 3. The court finds the aggravating circumstance in §13-454 E(3) [sic] is present. The evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00. The murders were not committed incidentally or accidentally to the robbery, on the contrary they were intentionally and premeditately [sic] committed solely for a financial motive.
>
> 4. The court finds the aggravating circumstance in §13-454 E(4) [sic] is present. In making this finding, the court is not unmindful of State v. Poland ____Ariz.____ 645 P2d, 784, and reviewed that case in light of the evidence in this trial and other Supreme Court guidelines.

> The cause of death was by drowning. The victims were kidnapped on I-17 in southern Yavapai County, they were transported to Lake Mead. Some 24 hours later they were placed in canvas bags, taken onto the lake and dropped in the water to drown. The culmination of months of planning. The executed plan shows the state of mind of the defendants and that such killings were especially hienous [sic] and depraved.
>
> In applying this provision, the Arizona Supreme Court has said that these words have meanings that are clear. The evidence shows that the killings were carefully planned and cold blooded. This, by itself, is not sufficient, however, as pointed out in St. v. Madsen 125 Ariz. 346, 609 P2d, 1046.
>
> But the facts show the murders were shockingly evil, insensate, and marked by debasement.
>
> The Defendants argue that the State has not shown the victims suffered pain, or that they were not drugged. The killings were cruel whether the victims were drugged or not.
>
> The guidelines of State v. Knapp 114 Az. 531, 562 P2d 704 and State v. Gretzler, No. 3750-2 (Jan. 6, 1983) closely reach this case. In Knapp the victims were incinerated. The autopsy showed there was carbon monoxide poisoning as well, a painless death. In Gretzler there was mental distress visited upon the victims. In the case sub judice, the nature of the killing itself is sufficient to set it aside from the norm. Holding the victims captives, placing them in specially made canvas bags and dropping them to a slow, painful and terrifying death is grossly bad, sadistic and perverse.

The trial court again found some mitigating circumstances, but it concluded that they were not sufficiently substantial to merit leniency.

Petitioner and his brother again appealed from the judgments of guilt and sentences imposed. On March 20, 1985, the Arizona Supreme Court affirmed the judgments and sentences. A three member majority rejected petitioner's

claim that the court had "acquitted" him of the death penalty in his first appeal and that the double jeopardy clause therefore precluded reimposition of the death penalty. State v. Poland, ___Ariz.___, 698 P.2d 183, 198-99 (1985). The court also set aside the trial court's finding that the killing had been committed in an especially heinous, cruel or depraved manner. Id. at 199-200.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

ARGUMENT

PETITIONER HAS NEVER BEEN ACQUITTED OF THE DEATH PENALTY. THEREFORE, THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR HIS PRESENT DEATH SENTENCE.

Petitioner contends that the Arizona Supreme Court "acquitted" him of the death penalty on his first appeal, and concludes that the double jeopardy clause bars any subsequent reimposition of the death penalty. Petitioner's position is meritless.

The double jeopardy clause protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). It does not bar reprosecution of a defendant whose conviction is overturned on appeal. United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). The clause also protects a defendant in a capital case who has been acquitted of the death penalty following a capital sentencing proceeding that is like a trial.

Arizona v. Rumsey, ____U.S.____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

Petitioner misrepresents the holding of the Arizona Supreme Court in his first appeal. That court never acquitted petitioner of the death penalty. It did find that the evidence did not support the "heinous, cruel or depraved" aggravating circumstance, but it did not find that the evidence did not support the imposition of the death penalty. It specifically left that question open because of the trial court's conditional finding regarding the "pecuniary gain" aggravating circumstance. State v. Poland, supra, 132 Ariz. at 285-86, 645 P.2d at 800-01. The Arizona Supreme Court, in all death cases, independently reviews the record to determine for itself the aggravating and mitigating factors, and then to determine if the latter outweigh the former. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51, cert. denied, 433 U.S. 915 (1976). Thus, the fact that the state did not appeal from the trial court's finding regarding the "pecuniary gain" circumstance did not preclude the Arizona Supreme Court from reviewing that finding. The court could have gone on to determine for itself whether the death penalty should have been imposed based upon the "pecuniary gain" circumstance. However, since it had already reversed petitioner's conviction, it simply left the question for the trial court in the event of a conviction following the retrial. Thus, the Arizona Supreme Court did not acquit petitioner of the death sentence. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1981), is therefore inapplicable in this case. Since petitioner has

never been acquitted of the death sentence, the double jeopardy clause offers him no protection from his present sentence.

Petitioner would extend the holdings of Rumsey and Bullington so that not only would Arizona's capital sentencing proceeding be comparable to a trial for purposes of the double jeopardy clause, but also that sentencing "trial" would consist of a number of separate "trials" on the existence or nonexistence of individual aggravating circumstances. Thus, an "acquittal" of an aggravating circumstance at one of these "sub-trials" would give the defendant the protection of the double jeopardy clause and preclude a "retrial" on that aggravating factor at any subsequent resentencing. This Court has never extended the protection of the double jeopardy clause this far. Double jeopardy protection only comes into play where there has been an end to a criminal proceeding, e.g., a jury verdict of not guilty, a trial court's decision to impose a life sentence rather than the death penalty in certain trial-like capital sentencing proceedings, etc. See Justices of Boston Municipal Court v. Lydon, ____U.S.____, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984). Double jeopardy protection does not extend to the numerous individual steps that lead up to a final decision in a criminal proceeding.

Thus, for purposes of double jeopardy protection, there is no such thing as an "acquittal" of an aggravating circumstance in a capital sentencing proceeding. See, e.g., Green v. Zant, 738 F.2d 1529 (11th Cir.), cert. denied, ____U.S.____, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984); Knapp v. Cardwell, 667 F.2d 1253 (9th Cir.), cert. denied, 459 U.S. 1055 (1982); Hopkins v. State, 664 P.2d 43 (Wyo.),

cert. denied, ____U.S.____, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983); State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, cert. denied, ____U.S.____, 103 S.Ct. 244, 77 L.Ed.2d 1327 (1983); Spaziano v. State, 443 So.2d 508 (Fla. 1983);[3] Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982), cert. denied, ____U.S.____, 103 S.Ct. 3552, 77 L.Ed.2d 1398 (1983). Thus, petitioner's "acquittal" of certain aggravating circumstances did not preclude the trial court from finding those circumstances at resentencing.

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3. This Court affirmed Spaziano's conviction and sentence in Spaziano v. Florida, ____U.S.____, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), although it did not consider the "double jeopardy-aggravating circumstance" issue.

CONCLUSION

Because petitioner has failed to show a violation of any constitutional right, this Court should deny the petition for certiorari.

Respectfully submitted,

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AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GERALD R. GRANT, being first duly sworn upon oath, deposes and says:

That he served the attorney for the petitioner in the foregoing case by forwarding two (2) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

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this 1st day of August, 1985.

Gerald R. Grant
GERALD R. GRANT

SUBSCRIBED AND SWORN to before me this 1st day of August, 1985.

Chris L. Piske
CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:

October 28, 1985

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